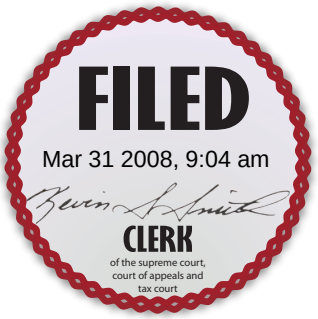

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IN THE COURT OF APPEALS OF INDIANA

KATHIE M. EVANS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A04-0709-CR-548
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No. 84D03-0607-FB-2063

March 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kathie M. Evans appeals her seven-year sentence for Class B felony sexual misconduct with a minor.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On June 9, 2006, Evans' adult son, Dwayne Hill, walked into Evans' bedroom and saw her having intercourse with her fifteen-year-old stepson C.R. C.R. told his father, the police, and a child protective services investigator that he and Evans had intercourse. Evans admitted to police that C.R.'s penis penetrated her vagina.

On July 5, 2006, the State charged Evans with one count of sexual misconduct with a minor as a Class B felony. Evans entered a plea of guilty on July 17, 2007. After a pre-sentence investigation was conducted and a hearing was held, the court imposed a seven-year sentence, with four years suspended. The court ordered Evans to serve two years in the Department of Correction, one year in community corrections, and two years on probation.

DISCUSSION AND DECISION

1. Validity of Sentence

Evans alleges the court committed a number of errors when imposing her sentence. Evans pled guilty to a Class B felony, which has a sentencing range of six to twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. The court imposed a seven-year sentence, which is one year more than the minimum, and suspended four of those years.

Sentencing decisions "rest within the sound discretion of the trial court and are

[1] Ind. Code § 35-42-4-9(a)(1).

reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds* 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (*quoting K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2005)). A trial court may abuse its discretion by finding aggravators that are not supported by the record or are improper as a matter of law. *Id*. at 490-91.

First, Evans notes the court did not find mitigators in her guilty plea and in the stress she was experiencing when the crime occurred. The court noted Evans "clearly [was] under all sorts of stress at the time this incident happened." (Tr. at 19.) But the court declined to find that stress a mitigator because Evans had been "trying to downplay [her] role in what happened," (*id.* at 20), and had been changing her story over time. We find no abuse of discretion in the court's refusal to find that mitigator.

As for Evans' guilty plea, we disagree with her assertion the court should have found it a "significant mitigator." (Appellant's Br. at 11.) "[T]he significance of a guilty plea as a mitigating factor varies from case to case. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea." *Anglemyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007). The evidence against Evans was overwhelming, yet she did not take responsibility for her behavior. In this circumstance we find no abuse of discretion in the court's failure to identify her guilty plea as a mitigating factor. *See id.* (no abuse of discretion in failure to find plea a mitigator where

plea was pragmatic decision and defendant minimized his culpability).

Second, Evans claims the court should not have considered the evidence in the pre-sentence report indicating she had been having intercourse with C.R. for several months. While Evans alleges the evidence in the pre-sentence report is inadmissible hearsay, she waived any allegation of error on appeal by failing to provide argument or citation to authority demonstrating the court's consideration of the pre-sentence report was improper. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), *trans. denied* 841 N.E.2d 191 (Ind. 2005); Ind. Appellate Rule 46(A)(8). Nor did she object at trial to the court's consideration of the evidence or show she was prejudiced by the court's consideration of that fact. We note the court did not find any aggravating factors and sentenced her to less than the advisory sentence.

Third, Evans claims the court erred because she "was eligible to have her entire sentence suspended." (Appellant's Br. at 9.) Ind. Code § 35-50-2-2 permits the court to suspend all of a sentence for a Class B felony, if the defendant has no prior convictions and if the crime is not excluded by other subsections of that statute. Assuming *arguendo* Evans was eligible for a fully suspended sentence,[2] trial courts have broad discretionary power to decide whether to suspend sentences and order probation. *Taylor v. State*, 820 N.E.2d 756, 760 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 739 (Ind. 2005). In light of the fact Evans minimized her responsibility for this crime even after she was caught

[2] The State did not respond to this portion of Evans' argument.

having sex with her step-son, we see no abuse of discretion in the court's decision not to suspend all of Evans' sentence.

Fourth, Evans asserts the court did not give an explicit "statement for its reasons for selecting the sentence imposed," (Appellant's Br. at 13), or a "statement about trying to balance the zero aggravators with the one significant mitigator that the Court . . . found." (*Id.* at 14.) We disagree. The court did explain its sentencing decision:

> And then to consider aggravating and mitigating circumstances. Your lack of criminal history is a significant mitigating circumstance here. And there are no statutory aggravating factors I think under the current state of the law really the only one without evidence would be the criminal history and here there is none. But I get a strong sense from reviewing the Pre-Sentence Investigation that you, although you have . . . I mean, clearly you were under all sorts of stress at the time this incident happened, but there has been a lot of minimization on your part as to trying to downplay your role in what happened and your stor [sic] . . . the statements you made to the police changed about what happened and your role and I think it's pretty clear from the Pre-Sentence Investigation that this relationship wasn't . . . this sexual relationship wasn't a one time incident that occurred on this date, that it actually had gone on for several months and that you have done your best to minimize this throughout this process.

(Tr. at 20.) The court's statement was adequate to indicate why, with one significant mitigator, Evans received nearly the minimum sentence, with half the sentence suspended.

2. Inappropriateness of Sentence

Pursuant to the Indiana Constitution and Ind. Appellate Rule 7(B), we may revise a sentence if it is "inappropriate in light of the nature of the offense and the character of the offender." We give deference to the trial court's decision, recognizing the special expertise of the trial court in making sentencing decisions. *Barber v. State*, 863 N.E.2d

1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Evans claims her sentence is inappropriate because C.R. told police and child protective services that he did not want her to go to jail. She cites *Serino v. State*, 798 N.E.2d 852, 858 (Ind. 2003), for the proposition which states: "Although recommendations from a victim's family as to sentencing and testimonies regarding good character do not constitute mitigating or aggravating circumstances of the customary sort; they may properly assist the court in determining the sentence to be imposed." Most of Evans' seven-year sentence was suspended, and she will serve only two years in the Department of Correction, even if she receives no good time credit. Evans has not demonstrated the court failed to consider the victim's request that she not be imprisoned.

Although Evans has not otherwise argued her sentence is inappropriate, we see nothing about her character or offense that would suggest a seven-year sentence, with four years suspended, is inappropriate for Evans' Class B felony sexual misconduct with her minor step-son.

Affirmed.

RILEY, J., and KIRSCH, J., concur.